IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; ET AL.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY,

Respondents.

Appeal From the Supreme Court of the State of Wisconsin

BRIEF OF RESPONDENT ALLEN-BRADLEY COMPANY

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OPINIONS BELOW

This is an appeal from the decision of the Supreme Court of the State of Wisconsin, reported in 237 Wis. 164, 295 N.W. 791. It is also printed in the Record at pp. 37-54. The Opinion of the Circuit Court of Milwaukee County is not reported, but appears in the Record at pp. 24-26.

STATEMENT OF THE CASE

We desire to add the following to appellants' Statement of the Case:

This is an appeal from a judgment of the State Supreme Court, affirming the judgment of the Circuit Court of Milwaukee County, which sustained and enforced a Final Order of the Wisconsin Employment Relations Board (herein sometimes called the "Wisconsin Board"). The Order was entered in a proceeding commenced before the Wisconsin Board by respondent Allen-Bradley Company (herein sometimes called the "Company"). The Company's complaint charged appellants (herein sometimes called the "Union and its members") with violence, threats, mass picketing, interference with entrance to, and egress from, the Company's factory, and obstruction with the free use of public streets and sidewalks around its factory, which were unfair labor practices under subsections (a), (f), and (h) of Section 111.06(2) of the Wisconsin Employment Peace Act (herein sometimes called the "Wisconsin Act"). (R. 28-30)

The Wisconsin Act involved in this case is the 1939 Act. That Act repealed a previous Wisconsin Labor Relations Act passed in 1937, which was practically a counterpart of the National Act.

The Union and its members went on strike on May 10, 1939. The strike lasted about three months. During all of this period, as found by the Wisconsin Board, the Company continued to operate its plant, and the Union and its members carried on a continued course of mass picketing, violence, threats, assaults, property damage, and obstruction of streets and sidewalks surrounding the

factory for the purpose of hindering and preventing the pursuit of lawful work and employment by those employes who desired so to do. (R. 14) The Judgment appealed from ordered the Union and its members to cease and desist from:

(a) Mass picketing at or near the Company's plant;

(b) Threatening Company employes with physical injury, property damage, or otherwise;

(c) Obstructing or interfering with entrance to or egress from the Company's plant;

(d) Obstructing or interfering with the free use of streets and sidewalks around the plant;

(e) Picketing the domiciles of Company employes. (R. 27-28)

The Board's Order, and the Judgment enforcing it, contained no provision directed to the 14 individuals named as appellants. As to them, the action of the Wisconsin Board was limited to: (a) The making of Findings of Fact that they committed violence and other acts of misconduct; and (b) a Conclusion of Law that they were guilty of unfair labor practices by reason of such acts. (R. 13-17)

In the Wisconsin Supreme Court, the appellants did not raise the issue of pre-emption of this field of legislation now raised in this Court. The opinion of the Wisconsin Supreme Court on this point states:

> "Upon this appeal no question is raised as to the constitutionality of the Wisconsin Employment Peace Act, * * * pursuant to which the proceeding under consideration was had, except that it is in conflict with the National Labor Relations Act. * * * Stated in the language of the brief, the appellants contend

> "'That the Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce.'"

In their present Assignments of Errors and Specifications of Errors to be urged on this appeal, appellants now take the contrary position and assert that in enacting the National Act, Congress preempted the subject of labor relations, and that, therefore, the entire Wisconsin Act is unconstitutional on its face. (Specification of Errors To Be Urged No. 4; Appellants' Brief, p. 9)

Appellants concede that the National Act regulates only the conduct of employers and creates only *employer* unfair labor practices. In spite of this, they contend that the specific sections of the Wisconsin Act here involved, which define and create *employee* unfair labor practices (Section 111.06(2)) and *Union* unfair labor practices (Section 111.06(3)) are, nevertheless, in direct conflict with the National Act, and therefore, unconstitutional. (Specification of Errors To Be Urged No. 3 and No. 6)

Although it was stipulated that the business of the Company in interstate commerce was in sufficient quantity to render it subject to the jurisdiction of the National Act in a proper case, no proceedings under that Act have been instituted or were pending at any time during the pendency of this case. (R. 36, 48)

The Decision of the Wisconsin Supreme Court

The Wisconsin Supreme Court held that:

(a) The Wisconsin Act deals with labor relations "in the exercise of the police power of the State." (R. 48)

(b) The National Act was drawn with consummate skill "for the declared purpose of regulating and protecting interstate commerce and yet at the same time leaving the field of proper state action unrestricted so far as possible." (R. 43)

(c) We must first consider the purpose and scope of the National Act "for the reason that wherever it applies, it excludes State action from the occupied field. Upon this proposition there is no disagreement." (R. 42)

(d) "To the extent that the orders of the National Labor Relations Board apply to a particular controversy, the jurisdiction of the State authorities both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any State authority to the contrary notwithstanding." (R. 48)

(e) " • • • Congress does not seek in the National Labor Relations Act to deal with labor relations generally. It deals with labor relations only so far as, in its opinion, it is necessary to protect interstate commerce from being impeded or obstructed by unfair labor practices on the part of employers." (R. 46)

(f) The National Act had not preempted the field and " • • • The action of Congress leaves to the State full authority to deal with labor relations generally.

Congress exercises its power in the interest of interstate commerce. With that subject the State has nothing to do. Its power to regulate labor relations is derived from an entirely different source,—the power to promote the peace, morals, health, good order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the Federal domain." (R. 49)

(g) On the issue of alleged conflict between the two Acts, the Court construed the Wisconsin Act to provide that the employe status of the 14 individual appellants was not affected because the Board's Order contained "no provision which suspends the (their) status * * * " and the findings of violence, etc., and the Conclusion of Law as to guilt of unfair labor practice had no such effect under the Act. (R. 50-52)

(h) The Court held also that there was no conflict between the two Acts because of difference in the definition of "employe" (Section 111.02(3) of the Wisconsin Act and Section 2(3) of the National Act), because "these definitions apply only for the purpose of the Act in which they are found," (R. 52) and further because "No matter how arrived at by the Boards there can be no conflict if there is none in the orders dealing with the same labor dispute." (R. 52)

(i) As to the other respects in which appellants claimed the two Acts to be in conflict, the Court held that the State police power "is not destroyed by Federal action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by

the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act. * * * If the National Labor Relations Act is repealed, the power of the state over labor relations will be the same as it was before the act was passed. If the Interstate Commerce Act should be repealed the state's power over interstate commerce would not be enlarged. It might have greater latitude in dealing with intra-state commerce but its jurisdiction would be over intra-state commerce, not over interstate commerce." That, therefore, there was no conflict because the National Board had not acted to apply the National Act in this case. (R. 53)

Issue Involved

The Wisconsin Act applies to all employers and employes in the State, whether engaged in intrastate commerce or in interstate commerce. There is no contention that the Act is unconstitutional with respect to employers and employes engaged in intrastate commerce. Therefore, as stated by the Wisconsin Supreme Court, the appellants are really not arguing that the Act is unconstitutional, but rather that it can have no application to an employer who *might* be subject to the National Act, because the jurisdiction of the National Act has preempted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce. (R. 41)

The Order and Judgment here appealed from protect the Company and its employes from acts of violence, intimidation, and coercion; acts which are wrongful and unlawful in any society. Narrowed down to its essentials, therefore, the issue in this case is whether, by enacting the National Act, Congress has deprived the State of Wisconsin of its right to exercise its police power to

protect its citizens against such inherently wrongful conduct by a civil remedy to be administered through the Wisconsin Board and the State Courts.

And the real controversy arises over the validity of the specific portions of the Wisconsin Act on which the Order is based (Section 111.06(2)(a) and (f) and (3)) as applied to the appellants.

SUMMARY OF ARGUMENT

I.

The enactment of the National Act does not deprive the State of its police power in the field of labor relations. The intention of Congress to exclude the exercise of such power must be clear, and the question of intent is interwoven with the question of whether there is actual conflict. All doubts will be resolved in favor of sustaining the State law. The nature of the subject requires an especially clear showing of both intent and actual conflict.

Generally this field is one for exclusive State regulation. Congress was entering a new and uncharted field in which its jurisdiction was doubtful. It naturally proceeded cautiously and in a limited way. It certainly did not intend to affect the many State laws already in force affecting labor relations.

The National Act was intentionally narrow in its scope. It did not create the right of self-organization or to bargain collectively. The Congressional Committee Reports demonstrate the limited extent of Congress' entrance into this field of legislation.

Congress expressly refrained from regulating strikes or the conduct of employes in strikes. It considered

such legislation unnecessary, because existing State and Federal remedies were adequate. The Wisconsin Act, therefore, provides a remedy wholly outside of the field of the national legislation in the interest of peace and order in Wisconsin.

Since the limits of Federal jurisdiction were doubtful and uncertain, it is a violent assumption that Congress intended to exclude State legislation in this field.

II.

This case could not arise under the National Act, which regulates only employer unfair labor practices. Four of the five Sections of the Act which appellants claim are in conflict with the National Act are not involved in this case. The Court will decide only the constitutional issues presented and will not anticipate questions of constitutional law nor formulate rules broader than required by the case at bar.

The Wisconsin Court construed the Act as not affecting the employe status of appellants in the absence of a Board Order terminating such status. Such construction is conclusive in this Court.

The Wisconsin Court held that the definition of "employe" in the Wisconsin Act applies only for the purposes of that Act. Hence, there is no conflict with the National Act in this respect.

In so far as the Wisconsin Act gives power to suspend rights and remedies, it is clear: (1) That the Order here did not suspend any rights or remedies, and (2) The only rights or remedies which can be suspended are those granted by the Wisconsin Act.

Such suspension can have no effect in administering the National Act, as expressly held by the Wisconsin Court.

The right of a striking employe to continue as such is not an absolute right even under the National Act. It may be terminated for wrongful conduct, and the test of such wrongful conduct generally is based upon State law.

It is difficult to understand how an order forbidding violence can unlawfully interfere with the right of self-organization or to collectively bargain, as appellants contend.

The alleged conflict in public policy between the two Acts is entirely fanciful. As to other alleged conflicts, the sections of the Wisconsin Act in question can affect only the administration of the State Act, and as held by the Wisconsin Court, whenever the National Board takes jurisdiction, the State law and Orders made under it, must give way.

Appellants' entire Brief is predicated on the false premise that an Order forbidding violence per se interferes with self-organization and collective bargaining.

ARGUMENT

I.

The Enactment of the National Act Does Not Deprive the State of its Police Power in This Field of Regulation.

(a) The intention of Congress to exclude the exercise of police power must be clear. The determination of that question is interwoven with the question of whether actual conflict between the two Acts exists.

There is nothing in the National Act which expressly forbids State legislation. Under such situation, it is, of course, well settled that

(1) The intent of Congress to exclude States from exercising their police power must be clearly shown;

(2) The intent to supersede such police power will not be implied unless there is such repugnance and conflict between the two Acts that they cannot be reconciled or consistently stand together; and

(3) If, in construing the Federal Act as a whole, there is room for doubt, the established rule of construction requires the Court to resolve such doubt in favor of sustaining the validity of the State law.

In *Kelly vs. Washington,* 302 U.S. 9, 10, (1937), this Court, speaking through Chief Justice Hughes, said:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases,* 230 U.S. 352, 402. States are thus enabled

> to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

In *Reid vs. Colorado,* 187 U.S. 137, 148, the principle was thus emphatically stated:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."

In *Savage vs. Jones,* 225 U.S. 501, 533, a Federal Act dealt with the subject of adulterated and misbranded foods. It covered any false or misleading statements as to ingredients. It did not require a disclosure of the ingredients. The State of Indiana enacted a Statute dealing with the disclosure of the ingredients, in other words, with the matter *omitted from the Federal Act.* This Court held that the State requirement could be sustained without impairing the operation of the Federal Act as to the matters with which that Act dealt, and in so doing, this Court said:

> "But the intent to supersede the exercise by the State of its police power as to matters not covered

> by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. * * *" (p. 533)

In *Mintz vs. Baldwin,* 289 U.S. 346, 350, the issue was the validity of a New York Statute requiring cattle to be certified as free from Bang's disease. The Act was claimed to be in conflict with the Federal Statute known as the Cattle Contagious Disease Act. In sustaining the State law, this Court said:

> "The purpose of Congress to supersede or exclude State action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear." (p. 350).

In the *Kelly* case, supra, p. 11, the Court stated that this principle applies strongly where the State has exercised its power to protect the lives and health of its people, but that it extends also "to exertions of State power directed to more general purposes," citing *Atchison, T. & S. F. Ry. Co. vs. Railroad Commission,* 283 U.S. 380, 391.

The burden is, therefore, upon the appellants to establish definitely and clearly that by enacting the National Act, Congress intended to exclude the States from this exercise of their police power, and that there is repugnance and conflict between the two Acts, of such a direct and positive nature, that they cannot be reconciled or consistently stand together.

(b) The nature of the subject matter regulated requires an especially clear showing of such intent and of such conflict.

The regulation of labor relations is a field which, until recently, was generally considered to be exclusively with-

in the regulatory powers of the States. Actually, the direct regulation of labor relations, as such, is still exclusively a State function, because the National Act and similar enactments will be valid, not as a direct regulation of labor relations, but rather as a regulation of interstate commerce.

N. L. R. B. vs. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615;

N. L. R. B. vs. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S. Ct. 490.

In 1937, the Wisconsin Legislature passed a Labor Relations Act (then known as the Wisconsin "Little Wagner Act"), which was a substantial counterpart of the present National Act. The validity of that Statute was before the Wisconsin Supreme Court in the case of *Wisconsin Labor Relations Board vs. Fred Rueping Leather Company*, 228 Wis. 473. The contention was made in that case that the National Act had precluded the State from legislating in this field. The Court, in an able and thorough opinion by Mr. Justice Wickhem overruled that contention. In so doing, the Court, after citing the cases above referred to and others, recognized that in determining the Congressional intent, the nature and the general field of the legislation was an important factor. It pointed out that at the time of the enactment of the National Act:

> "* * * Congress was entering a new and uncharted field, one in which the boundaries of any competency it might have were extremely doubtful. It was already occupied at least in part by State laws passed in exercise of the police power to preserve local peace and good order." (p. 489)

The Court also said:

> "We discover nothing in the legislative history of the bill which later became the National Labor

Relations Act to give comfort or support to the claim that congress intended to exclude the states from the whole field of labor relations so affecting interstate commerce as to warrant federal legislation. These relations had theretofore been considered as properly belonging to the states under the police power. Not only this, but as a result of decisions in *Hammer vs. Dagenhart*, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, and other cases involving the validity of federal child labor acts, as well as the cases of *A. L. A. Schechter Poultry Corp. vs. United States*, 295 U.S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570, and *Carter vs. Carter Coal Co.*, 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160, there was a very substantial doubt whether congress could enter the field at all." (p. 488)

Wisconsin Regulations of Labor Relations

The State of Wisconsin has regulated labor relations in many ways other than the Wisconsin Act in question. Among others are (all references are to Wisconsin Statutes of 1941):

(1) Section 103.51, which states the State's public policy to be that

> " * * * Negotiation of terms and conditions of labor should result from *voluntary agreement* between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore *it is necessary that the individual workman have full freedom of association, self-organization,* and the designation of representatives of his own choosing, to negotiate

the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Emphasis ours.)

(2) Section 103.52 declares so-called "yellow dog" contracts to be contrary to public policy.

(3) Section 103.53 specifies lawful conduct in labor disputes to include:

(a) Ceasing or refusing to perform work;

(b) Becoming or remaining a Union member;

(c) Paying or giving strike benefits;

(d) Aiding persons proceeded against in Court;

(e) Advertising or giving information as to a strike, without intimidation or coercion or other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing to patronize or to employ any person, not, however, to legalize a secondary boycott;

(g) Assembling peaceably for the doing of any acts above specified or to promote lawful interests;

(j) Urging or inducing, without fraud, violence, or threat thereof, others to do the above acts;

(k) Doing in concert any of the above acts;

(l) Peaceful picketing, singly or in numbers.

(4) Section 103.54 protects officers of Unions and Unions themselves from liability for unlawful acts of individual officers or members, except upon proof by a preponderance of evidence and without the aid of any presumptions of law or fact of both (a) the doing of

such acts by the officers, members, or agents, and (b) actual participation in, or authorization of, such acts or ratification after actual knowledge thereof.

(5) Section 103.55 declares the public policy of the State in labor litigation to be against the easy obtaining of injunctive relief.

(6) Section 103.56 strictly regulates the granting of injunctions in labor litigation in a manner substantially identical to the Federal Norris-LaGuardia Act.

(7) Section 103.61 specifically provides the punishment which may be ordered for contempt for violation of injunctions in labor matters.

(8) Chapter 102 establishes a complete system for payment of workmen's compensation.

(9) Chapter 103 contains 82 sections which, in addition to those above mentioned, regulate many subjects, including hours of labor for women; employment of illiterate minors (Section 103.06); various health regulations incident to employment (Section 103.16 requiring seats for females); minimum wages for girl employes (Section 103.23); hours of work for boy employes (Section 103.24); duties of employers of boys in a street trade (Section 103.27); regulations as to when wages are payable (Section 103.39); hours of labor in construction, etc., of public buildings (Section 103.41); fraudulent advertising for labor (Section 103.43); regulating the payment of wages by checks or other paper than legal money (Section 103.45); regulation of deductions from wages for defective or faulty workmanship (Section 103.455); hours of labor in state institutions (Section 103.47); wages and hours on highway contracts (Section 103.50); general regulations of employment of minors

and women (Section 103.64-66); minimum ages in various employments (Section 103.67); hours of labor in various employments (Section 103.68); minimum ages for hazardous employments (Section 103.69); a permit system on employment of minors (Section 103.70-74); regulating employment of minors in public exhibition (Section 103.78); employment of minors as golf caddies (Section 103.79); regulating the advertising for employment of minors (Section 103.81).

(10) Chapter 104 enacts a minimum wage law.

(11) Chapter 105 regulates employment agencies.

(12) Chapter 106 provides for a system of indentured apprentices.

(13) Chapter 108 creates a system of unemployment reserves and unemployment compensation.

(14) The criminal laws of the State also contain various regulations of labor relations. For example, Section 351.50 requires at least one day's rest in seven as to certain specified occupations, and provides a penalty for violation thereof. Section 343.681 declares it a misdemeanor to combine, for the purpose of wilfully or maliciously injuring another in his trade, business, or profession by any means. Section 343.682 makes it a misdemeanor for two or more employers to combine to blacklist persons seeking employment or to cause the discharge of any employe by blacklisting, etc. Section 343.683 makes it unlawful, by threat, intimidation, force, or coercion, to hinder any person from engaging in lawful work.

It is clear from the foregoing that the regulation of the field of labor relations has many phases and vari-

ations. It is a subject recognized throughout the entire history of this country as one within the police power of the States. A power which consistently has been exercised by the States, and certainly by the State of Wisconsin, to preserve local peace and good order and generally for the betterment of the State and its citizens. Even a casual consideration of the above regulations indicates that if the Wisconsin Act in question is held to be void, such a decision would have a far-reaching effect upon the multitude of State laws in a field which for so long was considered as solely for State regulation.

(c) The National Act intentionally is narrow in its scope.

Appellants approach the issue on the basis that the National Act is a regulation of labor relations; that by enacting it, Congress "has laid down a policy governing labor relations affecting interstate commerce." (Appellants' Brief, p. 9) Counsel argue that the National Act encourages collective bargaining, (Brief, pp. 11, 30) and they point out that Section 111.01 of the Wisconsin Act "omits any positive declaration in favor of promoting collective bargaining." (Brief, p. 31)

These arguments take much too broad a view of the Federal Act and much too narrow a view of the Wisconsin Act and of other Wisconsin Statutes dealing with the subject of labor relations. This is particularly clear in view of Section 103.51 of the Wisconsin Statutes (quoted at page 15) which expressly sets out the State's policy in favor of the promotion of collective bargaining and of full freedom of association and self-organization. Since this is the only Federal law on the subject, it is reasonable to expect to find the national public policy there declared. But, with many State laws

in this field, it is rather extreme to require all State policy to be stated in this particular enactment.

The Federal Act clearly does not purport to regulate the entire field of labor relations. Its terms regulate only a very limited portion of that subject. Section 1 of the Act declares it to be the policy of the United States to eliminate the causes of "certain substantial obstructions" to commerce and to mitigate and eliminate those obstructions in the following way: (1) By encouraging collective bargaining; and (2) by protecting the exercise by workers of full freedom of self-organization and designation of representatives of their own choosing.

In furtherance of this policy, the Act, by Section 7, declares the previously existing right of employes to self-organize and to bargain collectively. By Section 8, it declares certain acts by an employer, interfering with these rights, to be unfair labor practices. By Section 10, it provides a remedy for their prevention. By Section 9, it establishes the majority rule for the designation and selection of exclusive representatives for collective bargaining. The other sections of the Act are merely supplementary to the points above specified.

It is at once obvious that the Act makes no pretense of regulating the many phases of labor relations which, over a period of many years, have been subject to many forms of State regulation.

As pointed out by this Court in *Amalgamated Utility Workers vs. Consolidated Edison Co.*, 309 U.S. 261, 60 S. Ct. 561, 84 L. Ed. 493, the National Act did not create the rights of employes to self-organize or to bargain collectively declared in Section 7. Those are

fundamental rights which existed prior to the enactment of the National Act.

That the scope of the National Act is limited appears not only from the Act itself, but from the Reports of Congressional Committees. In the House Committee Report dated June 10, 1935, Report No. 1147, it is stated (emphasis throughout is ours):

> "* * * The Committee wishes to emphasize particularly the objective of the bill to remove *certain* important sources of industrial unrest engendered, first, by the denial of the right of employes to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions traceable to the absence of processes fundamental to the friendly adjustment of such disputes * * * By protecting the right of employes to organize and bargain collectively, and as a direct result by promoting just and appropriate practices for friendly adjustment, the bill eliminates many of the most important causes of unrest and strife. * * *"

The Senate Committee Report dated May 2, 1935, Report No. 573, says, with respect to Sections 7 and 8 of the Act:

> "These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the Committee wishes to emphasize two points. *In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8.* This is made clear by paragraph 8 of Section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8,' and by Section 10(a) empowering the Board to prevent any unfair labor practice 'listed in Section 8.' *Unlike the Federal*

Trade Commission Act, which deals somewhat analogously with unfair trade practices, *this bill is specific in its terms.* Neither the National Labor Relations Board nor the Courts are given any blanket authority to prohibit whatever practices that in their judgment are deemed to be unfair."

The limited scope of the Act further appears from that portion of the House Committee Report dated June 10, 1935, Report No. 1147, with respect to the objection that the Act was unfair because it was limited to employer unfair labor practices. In this connection, the Report states:

"Objection is constantly made that the bill is limited to unfair labor practices by employers. It is contended that the bill should prohibit 'any one,' including, of course, an employe or labor organization, from interfering with, restraining or coercing employes in the exercise of these rights * * * But it is clear that corresponding to the right of employes to be free from interference, etc., by their employer in their organization activities, is the right of the other party to the negotiations, the employer, to be free in his designation of representatives for that purpose. * * * Such a reciprocal provision, forbidding employes to interfere with the right of employers to choose their representatives for collective bargaining would be a merely formal requirement, ignoring the realities of the situation. *In the light of common knowledge, it can hardly be said that this right of employers needs protection under this bill.* Organizations of employers in trade associations and in national organizations of such trade associations, have blanketed the country. * * * "

We think it is clear from the foregoing that the *sole* purpose of Congress was to attempt as a regulation of interstate commerce, to cure a *portion* of the evils caused by strikes by declaring and providing a remedy for *specific* unfair labor practices as an *aid* to employes in exercising their previously existing rights to self-organize and to engage in collective bargaining when so organized.

Such a narrow and well-defined purpose does not support the inference of an intent to exclude the States from this field of legislation, especially under the circumstances existing when the Act was passed.

The National Act Does Not Regulate Strikes

Section 13 of the National Act provides:

> "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

The House Committee Report above quoted (Report No. 1147) states that the Bill deals with the failure to adjust disputes traceable to the absence of processes fundamental to the "friendly adjustment of such disputes."

The specific unfair labor practices which Congress deemed it necessary to define and forbid in order to accomplish its limited purpose, relate only to the conduct of an employer. The Act, in no way, therefore, regulates strikes or the conduct of employes in strikes, which, of course, are not the "friendly adjustment" of labor disputes referred to by the House Committee.

This Section of the National Act shows expressly that Congress did not itself intend to regulate strikes.

It intentionally left the States free to regulate such conduct, so long as, in so doing, they do not actually burden or obstruct interstate commerce.

The House Committee Report, No. 1147, before referred to, quoted with approval from the Report on S-1958 by the Senate Committee on Education and Labor, in part, as follows:

> "* * * The bill is not a mere police-court measure. The remedies against such acts (referring to fraud or violence by employes or labor unions) in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence, or threats of violence. * * *
>
> "In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. * * * *"

In testifying before the Senate Committee, Senator Wagner (the father of this Bill) said:

> "It has been claimed that in order to be fair, the bill should prohibit employes and labor organizations, as well as employers, from coercing employes in their choice of representatives. This argument rests upon a misconception of the needs which give rise to this measure. Violence and intimidation by either employers or workers are *adequately prevented by the common law* and do not require special treatment. This measure deals with the subtler forms of economic pressure. Such pressure cannot be exerted by employes upon one another *to an extent justifying congressional action.*" (Emphasis ours.)

Thus, Senator Wagner argued that State laws are adequate to prevent violence and intimidation by employes, and that the pressure of wrongful acts by employes does not occur to an extent "justifying congressional action." His whole thought was that such wrongful acts can be handled by State laws, and therefore, Federal legislation is neither necessary nor justified.

The above quotations from the Congressional Committee reports and the act itself show that in enacting the National Act Congress reasoned as follows:

1. Employees and employers alike have the free right to organize.

2. Employers have been successful in organizing as shown by trade associations which "have blanketed the country." Since employers have been so successful in exercising their right to organize, that right does not need "protection under this bill," and a reciprocal provision forbidding employes to interfere with this right of employers would ignore "the realities of the situation."

3. The employees have not been as successful in exercising their right of self-organization.

4. Therefore, as a regulation of Interstate Commerce, this Statute should be passed, giving them protection against specific employer unfair labor practices so they may more effectively exercise their right to organize and effectively bargain collectively.

5. To promote the "friendly adjustment of such disputes" we will encourage collective bargaining by making the refusal of an employer to bargain collectively

with representatives of the majority an unfair labor practice (Section 8 (5)).

It is apparent that Congress sought to accomplish two specific things:

(1) To equalize the self-organization rights of employers and employes by giving employes the opportunity to exercise their right as effectively as employers had been exercising theirs; and

(2) To require employers to engage in collective bargaining with representatives of a majority.

Clearly, there is nothing in the foregoing indicating an intention of Congress to forbid the States from seeking other objectives not in conflict with the foregoing, which the States deemed necessary for the welfare, peace, and good order of its citizens.

In enacting the Wisconsin Act, and particularly the subsections here under consideration, the Wisconsin legislature had the foregoing purposes in mind and something additional. It recognized, as an exercise of its police power, that in the interests of the public, the employee, and the employer it was necessary to regulate something more than merely this right to self-organize and to collectively bargain. It recognized that *peace and good order were desirable even in strike situations.* It therefore created this civil remedy to prevent acts, each of which is generally recognized as unlawful and improper per se.

The civil remedy was created to protect not merely the right of self-organization and of collective bargaining, but also the other matters of public policy declared by the act, namely the interrelated interests of the

public, the employee and the employer in industrial peace, in regular and adequate income for employees, and in the uninterrupted production of goods and services. (See declaration of policy in Wisconsin Act, Sec. 111.01 —Appendix in Appellant's brief, page 55.)

This objective of the Wisconsin Act goes into a field in no way contemplated or considered by the National Act. Congress did not consider these objectives, but certainly Congress did not deliberately or consciously reject such legislation as improper. Certainly no reasonable man can argue that reasonable doubt does not exist as to the correctness of this contention, and in cases of reasonable doubt the court will not declare a Statute unconstitutional.

None of the unlawful acts enjoined by the subsections here under consideration or the order here involved has anything to do with the subject of interference with the right to self-organize or to bargain of either the employees or the employer.

It is clear that the portions of the law complained of are on a subject wholly outside of the field of the National Act.

The same contention here made by appellants was presented to and overruled by the Wisconsin Supreme Court in *Wisconsin Labor Relations Board vs. Fred Rueping Leather Co.*, (1938), 228 Wis. 473, 279 N.W. 673, supra. That case involved the validity of the Wisconsin Labor Relations Act passed in 1937. It was a substantial counterpart of the National Act and was known as the Wisconsin "Little Wagner Act." The Act was held to be

valid in a scholarly opinion by Mr. Justice Wickhem. The Court said:

> "The state may, therefore, regulate labor relations in the interests of the peace, health, and order of the state, and the federal government may regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce. Obviously, a possibility of conflict between these powers exists only as to the portion of the field with which congress has competency to deal. In the absence of a federal statute either dealing with or pre-empting this field, the police power of the state has full operation, provided no undue or discriminatory burdens are put upon interstate commerce." (p. 480)

As in this case, it was contended that Section 10(a) of the National Act, which provides that the power of the Board to prevent unfair labor practices shall be exclusive and shall not be affected by any other means of adjustment or prevention, showed an intention to pre-empt the field.

The Wisconsin Court in the Rueping case analyzed this section of the Act in the light of the other portions of the Act and held that it did not deal with the scope of the Act, but dealt merely with the powers and jurisdiction of the National Board in its administration of the Act, for the purpose of establishing its exclusive character, as contrasted with the numerous other Federal Boards and agencies then in existence, and which might otherwise be thought to have concurrent jurisdiction.

The Court also pointed out that several of the Wisconsin Statutes as to labor relations had been given force and effect by this Court, particularly Sections of the Wisconsin Labor Code in *Senn vs. Tile Layers' Protective Union*, 301 U.S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229,

and in *Lauf vs. E. G. Shinners & Co.*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 516.

Although the point here involved was not raised in this Court in the two cases last cited, the decisions of this Court enforcing the Wisconsin laws were recognized by the Wisconsin Court to support the conclusion that in enacting the National Act "Congress was entering a new and uncharted field, one in which the boundaries of any competency it might have were extremely doubtful."

The Court cited the opinion of Mr. Chief Justice Hughes in *Santa Cruz Fruit Packing Co. vs. N. L. R. B.*, 303 U.S. 453, 38 S. Ct. 656, to the effect that by suggesting doubtful and extreme cases, one might propose a startling broadening of the concept of interstate commerce that would virtually destroy the police power of the States; that the case holds the power of Congress under the commerce clause must be consistent with the maintenance of the Federal system; that formulas are not provided by the great concepts of the Constitution, and that "In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion." (p. 466)

The Wisconsin Court then concluded as follows:

> "It seems to us a violent assumption that in dealing with a subject in which the limitations on its power were and are so uncertain as to require determination by such a process congress could have intended to exclude state legislation in the field, except so far as it conflicted with the federal act. * * * The fact that under the National Labor Relations Act the board initiates all proceedings to administer or to enforce the act should also be considered in this connection. It cannot have been supposed that

> the cases deemed by the board so importantly to affect interstate commerce as to warrant intervention or with which the board had time to deal would include all of the cases which the states might need to deal with in the interests of local peace and good order. It cannot have been intended to 'paralyze the efforts of a state to protect her people against impending calamity' and commit the matter to the exclusive discretion of a distant and overworked federal agency. * * * " (p. 491)

Appellants' contention of pre-emption was definitely repudiated by this Court in the recent decision in *Milk Wagon Drivers' Union, Local 753 vs. Meadowmoor Dairies, Inc.*, 312 U.S. 287, wherein Mr. Justice Frankfurter stated, at page 295:

> " * * * To deny to a state the right to a judgment which the National Labor Relations Board has been allowed to make in cognate situations, would indeed be distorting the Fourteenth Amendment with restrictions upon state power which it is not our business to impose. A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."

Since a State may protect its citizens against violence and unfair labor practices by injunction, it seems clear that it may likewise protect them by the remedy created by the Wisconsin Act.

We submit that it is not definitely or clearly established that Congress intended to exclude the State from this exercise of their police power, or that in this case

there is repugnance and conflict between the two Acts of such a direct and positive nature that they cannot be reconciled or consistently stand together.

II.

The Issues in this Case Present no Conflicts Between the Two Acts.

(a) This case could not arise under the National Act.

This case could not have been brought under the National Act which relates only to unfair labor practices of *employers*. As demonstrated before, the Act provides a remedy only for certain specified acts, namely, "any unfair labor practice (listed in Section 8) affecting commerce." Section 10(a) of the National Act.

Section 8 specifies certain unfair labor practices by "an employer."

It is obvious that a strike in a plant engaged in interstate commerce might directly affect such commerce. Had it elected to do so, Congress, of course, had the power to enact provisions similar to the subsections of the Wisconsin Act here involved. Appellants argue that Congress' election not to do so establishes its intent to prevent the States from so doing. We think it has been demonstrated above that such failure by Congress is clear evidence of its desire to keep its legislation within narrow limits.

Appellants' argument was well characterized by the Wisconsin Supreme Court in the following language:

> "The appellants, while asserting that they do not do so, in fact argue this case as if the failure of Congress to define unfair labor practices of employes

operates as a license to employes in the enforcement of their demands to do any or all of the things declared by the Employment Peace Act to be unfair labor practices. (R. 49)

In this connection, we again call the Court's attention to the case of *Savage vs. Jones*, 225 U.S. 501, 533, supra, where this Court held that the intent to supersede the State police power "as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field." (p. 533)

(b) Various sections of the Wisconsin Act discussed by appellants.

In Subdivision II of Appellants' Brief, counsel discuss five separate provisions of the Wisconsin Act which they claim to be in conflict with the National Act. These relate to:

(1) Section 111.01, declaring the State public policy (Appellants' Brief, p. 31).

(2) A difference between the two Acts in the definition of labor disputes (p. 33).

(3) An alleged conflict as to bargaining rights of minorities (p. 35).

(4) An alleged conflict as to the determination of an appropriate bargaining unit (p. 35).

(5) An alleged conflict over unfair labor practices of employes and Unions (p. 37).

The first four items are sections of the Wisconsin Act not involved in this case. They present merely the *possibility* of conflict in cases which appellants' counsel think *may arise in the future.*

(c) The Court will decide only the constitutional issue presented by this case.

When the *Rueping* case, involving the 1937 Wisconsin Act, was before the Wisconsin Supreme Court, similar arguments were presented, and they were disposed of by the Court in that case in the following language:

> "With the possibility of conflict in the administration of the state and national labor relations acts, we find no occasion to deal further than to state what is obvious: That in case there is conflict in a matter properly within the scope of the national act, the state must yield. *See Mintz v. Baldwin,* supra. We see no reason to anticipate and determine when and under what circumstances the state board is ousted of jurisdiction. That question is not here under the facts of this case, and the possibilities of conflict may never materialize. When they do, it will be time enough to attack the problems they present." (*W. L. R. B. v. Rueping,* 228 Wis. 473, 492)

This, of course, is in line with the well established principle that this court will pass upon the constitutionality of a law only when necessary to the determination of the merits of the cause under consideration. The practice of this court has been aptly stated as follows:

> "* * * that it rigidly adheres to the rule *never to anticipate* a question of constitutional law, in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required *by the precise facts to which it is to be applied*, and never to consider the constitutionality of state legislation *unless it is imperatively required.*" 11 American Jurisprudence on Constitutional Law, page 722. (Emphasis ours)

See *San Bernardino County v. Southern P. R. Co.,* 118 U.S. 417, 6 Sup. Ct. 1144,

Tennessee Publishing Co. v. American National Bank, 299 U.S. 18, 57 Sup. Ct. 85,

Arizona vs. California, 283 U.S. 423, 51 Sup. Ct. 522.

In dealing with constitutional questions this court will not go beyond the limits of what is required by the exigencies of the case in hand.

Hauenstein v. Lymham, 100 U.S. 483, 25 L. Ed. 628.

Courts will meet questions as to the validity of legislation as they are raised, but will not anticipate them.

Boyd v. Alabama, 94 U.S. 645, 24 L. Ed. 302,

Euclid vs. Ambler Realty Co., 272 U.S. 365, 47 Sup. Ct. 114.

In construing state laws and in the absence of an actual decision of the state courts, the Federal Supreme Court will not assume that the law will be so broadly construed as to bring it in conflict with the Federal constitution.

Mountain Timber Co. v. Washington, 243 U.S. 219, 37 Sup. Ct. 260.

Until construed to the contrary by the state courts, the Federal Court will construe it in such a way as to leave it valid if that construction can reasonably be made.

Wadley S. R. Co. vs. Georgia, 235 U.S. 651, 35 S. Ct. 214.

Under this doctrine, it is clear that unless a party is directly and adversely affected by the portion of an Act challenged as unconstitutional, the challenge will not be passed upon by this Court.

(d) Alleged conflict of unfair labor practices of employee and unions.

The alleged conflict arising from subsections (a) and (f) of Section 111.06(2) and (3) of the Wisconsin Act defining employe and Union unfair labor practices, and the alleged conflict in the definition of the term "employe" (Section 111.02(3)), which appellants' counsel discuss in connection therewith (Appellants' Brief, pp. 37-45), are the only alleged conflicts within the issues of this case.

In arguing this point, as well as other points, appellants' counsel fail to accept as conclusive the Wisconsin Supreme Court's construction of the Wisconsin Act.

It is clear, of course, that the decision of the Wisconsin Supreme Court construing the Wisconsin Act is conclusive in this Court.

Senn vs. Tile Layers' Union, 301 U.S. 468, 477;

Minnesota vs. Probate Court, 309 U.S. 270, 273.

Appellants' counsel argue that as to the 14 individual appellants, the Act terminates their employe status by a mere Board finding that they have committed unfair labor practices. The Wisconsin Supreme Court has held that the finding has no such effect. As bearing generally upon this subject, appellants' counsel make other misstatements respecting the decision of the Wisconsin Supreme Court in this case. At page 24 of Appellants' Brief, they state, with respect to the individual appellants that "The State Board has branded them as outlaws under a State Labor Relations Act and subjected them to the forfeiture of their collective bargaining rights." At page 34, they say that under the State Act, the rights of the employes to be protected from employer unfair

labor practices and to vote as employes for the bargaining unit "are terminated."

These statements are directly contrary to the decision of the Wisconsin Supreme Court which held "that the act affects the rights of parties to a controversy pending before the Board only in the manner and to the extent prescribed by the order." (R. 51) It is undisputed that the Order in this case contained no such provisions.

Appellants' counsel are, of course, correct in saying that under Section 111.07(4) of the Wisconsin Act, the Board has power, in its discretion, to suspend for one year "rights, immunities, privileges, or remedies *granted or afforded by* this Chapter." The Order and Judgment in this case does not suspend any such rights or remedies. But, counsel argue that a conflict arises because of the *possibility* that in some future case the Board will, in its discretion, exercise that power.

It is in this connection, that counsel refer to the difference in the definition of the term "employe" in the two Acts. This difference, however, fades from significance in view of the construction placed upon it by the Wisconsin Supreme Court, first, that a mere finding by the Board that the employe has committed an unfair labor practice does not terminate his employe status, and second, that such definitions in each of the Acts "apply only for the purposes of the Act in which they are found." (R. 52) Clearly, the Wisconsin definition of the term has application only in the administration of that Act and has no bearing whatever upon the administration of the National Act.

The rights and remedies which the Board may suspend under this Section of the Statute are only those "granted

or afforded by this Chapter." The Wisconsin Supreme Court expressly recognized that the employe status is such a right or privilege when it said, in discussing this Section of the Act: "The continuation of the status of an employe is certainly a right or privilege. The Act specifically provides how it shall be terminated, that is, by Order of the Board. (R. 51)

It is immediately apparent that the suspension by the State Board of any rights or remedies afforded by the State Act can have no effect upon the administration of the National Act by the National Board. In administering that Act, the National Board will necessarily be controlled by its own provisions and by the National Act's definition of "employe." Any one who comes within that definition will be treated as an employe by the National Board irrespective of any State action to the contrary. This was expressly recognized by the Wisconsin Court when it held that "When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any State authority to the contrary notwithstanding." (R. 48)

Appellants' counsel argue that since the Board has the power to suspend rights or remedies granted by the Wisconsin Act, this causes a direct conflict with the National Act on the ground, as stated by appellants' counsel, that the termination of an employe status and of the employe's right to vote for bargaining representatives and of the Union to act as such representative "uses the loss of collective bargaining rights as a penalty for the violation of local police laws." (Appellants' Brief, p. 38)

Counsel overlook, however, that the rights and remedies which may be suspended are only those granted or afforded by the Wisconsin Act, which suspension necessarily can have no effect upon the National Act.

We think counsel fall into one other fundamental error in this respect. They seem to assume that under the National Act, the right of a striking employe to remain such an employe, with its corresponding right to have collective bargaining for him and to vote for bargaining representatives as such an employe, is an absolute one which can neither be reasonably regulated nor terminated. Appellants argue that this section of the Act shows a general State policy to discourage collective bargaining in conflict with the national policy to encourage it.

The Wisconsin Statutes above quoted which specifically declare the State policy in favor of collective bargaining are a sufficient answer to that contention, and we think that the decision of this Court in *N. L. R. B. vs. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S. Ct. 490, effectively disposes of the contention that the right of a striking employe to remain such is an absolute one.

That case held that rights of employes under the National Act were lost when they engaged in the unlawful conduct which occurred there. The test of whether such conduct is unlawful, of course, is based upon State and not Federal law. When the sit-down strikers in the *Fansteel* case invaded the Company's property, they were violating State laws, and it was such violation which caused the loss of their status as employes and of their rights under the National Act. It is clearly incorrect to say that every State law which may result in a loss of employe status and the accompanying bargaining rights is in violation of national public policy.

The decisions of the Federal Courts cited by appellants (*Stackpole Carbon Co.* case, *Garlyle Lumber Co.* case, *Republic Steel Co.* case, *Remington Rand, Inc.*, case. Appellants' Brief, pp. 41-43) are clearly distinguishable. In each of those cases, the principle enforced was that where an employer is guilty of unfair labor practices, and where the Board decides that in order to effectuate the purposes of the Act it is proper to require certain striking employes to be reinstated, the Board, in its discretion, may order the reinstatement of employes even though they have engaged in minor disorders common to labor disputes, such as a fist fight upon the picket line.

It was pointed out in the *Fansteel* case that "the fundamental policy of the Act is to safeguard the rights of the self-organization and collective bargaining" and not a right to engage in lawlessness. (306 U.S. 257)

We submit that a Statute which provides that an employe may lose his status as such because he commits acts of violence, intimidation, and other disorders, in no way interferes with the rights of self-organization or of collective bargaining. Certainly, it does not interfere any more than a Statute making such act a crime for which he could be put in jail, which certainly would effectively interfere with his employe status.

Appellants' counsel overreach themselves when they say (at p. 45) that the policy of the State Act is "to *require* the forfeiture of collective bargaining rights," and that it *"requires,"* as a penalty, employes who have violated local police laws to forego collective bargaining privileges and rights." (Emphasis ours.)

The decision in this case shows that the Act does not require any such thing.

At pages 46 and 47, counsel discuss what they believe was the theory of the Wisconsin Board as to the effect of a finding that an employe committed an unfair labor practice. The Wisconsin Board is composed of one lawyer and two laymen. Whatever that theory may have been, the effect of such a finding, or rather its lack of effect, is established by the decision of the Wisconsin Supreme Court in this case.

Appellants' counsel concede that the State of Wisconsin may legislate "upon the incidents of the employment relation as they relate to peace, morals, health, good order and general welfare." They concede that the State may punish "by proper civil or criminal measures, breaches of peace, disorder or acts of force or violence," and that the State "can send strikers to jail for disorderly conduct, unlawful assembly or riot." (Appellants' Brief, p. 20)

As stated by the Wisconsin Supreme Court, this is a concession that the State has power "to deal with some aspects of every labor dispute." (R. 53) In view of these concessions, it is difficult to understand counsels' contention that an order which merely requires appellants to cease and desist from violence, intimidation, etc., "has branded them as outlaws," or how such an order unlawfully interferes with the right of self-organization or to collectively bargain.

It is likewise difficult to see how such an order discourages collective bargaining or is an obstacle to the effectuation of the policies of the Federal Act. If it does, then the decision of this Court in the *Fansteel* case permitting the discharge of employes for violence would have a similar effect.

(e) Alleged conflict in declaration of public policy.

We think it clearly appears from the foregoing that such alleged conflict is fanciful. The public policy of Wisconsin as declared in the Act in question and in other statutes cited certainly declares the policy of promoting self-organization and collective bargaining.

In this connection appellants' counsel make a misstatement on page 31 of their brief where they say that "activities of workers to *induce* fellow workers to join a union and bargain collectively" under the statute are made "equally wrongful as is the coercion exercised by an employer * * *." Citing Section 111.06(2)(a) of the Wisconsin Act. This section appears at page 65 of the Appendix to appellants' brief.

The order in question was made under subsections (a) and (f) of that section. They make the following acts unfair labor practices: coercion and intimidation, injury to person or property, and prevention of work or employment by mass picketing, intimidation, force, or coercion; also the obstruction and interference with entrance to places of employment or the free use of the streets. It can hardly be said that this forbids activities of workmen "to *induce*" fellow workers to join a Union and bargain collectively.

(f) The alleged conflict as to definition of labor dispute.

In discussing this matter and referring to the rights of strikers to be protected from employer unfair labor practices, and to retain their employe status to vote for a bargaining agency, appellants' counsel say: "Under the State Act, these rights are terminated." (P. 34) This is a misstatement. The Board, in a proper case, has power to suspend rights granted by the Act, but the Act itself does not terminate such rights.

(g) Alleged conflict as to rights of minority to bargain collectively.

Appellants' counsel state that under Section 111.06(1)(e), an employer is guilty of an unfair labor practice if he bargains with representatives of a minority even though there is then no rival Union representing the majority. (Appellants' brief, p. 35)

This Section of the Wisconsin Act has never been construed by the Wisconsin Supreme Court. It is our opinion that counsel incorrectly construes this Section. When finally construed, in line with this and other Statutes declaring the State policy in favor of collective bargaining, we submit the Court will hold this Section to mean that an employer is guilty of unfair labor practice if he bargains collectively (as that term is defined in the Wisconsin Act, Sec. 111.02(5)), with representatives of a minority only when a Union represents the majority and he then has the duty to bargain with that majority. Such duty exists also under the National Act. (Section 8(5)).

As to all of the foregoing alleged conflicts, as well as the alleged conflict as to determination of the bargaining unit, it is clear that all of these provisions affect only the administration of the Wisconsin Act by the Wisconsin Board, as expressly held by the Wisconsin Supreme Court. Whenever the National Board takes jurisdiction and seeks to apply the National Act, all of the definitions and provisions of the Wisconsin Act and the application thereof by the Wisconsin Board, must give way to the superior force and effect of the National Act and of any order which the National Board makes under it.

(h) Separability clause.

Appellants' counsel argue at page 49 that the Act is unconstitutional as a whole and that its provisions are not separable. This is clearly erroneous. Certainly there is nothing in this case which makes it impossible to sustain the order here made and the subsections of the statute on which it is based, forbidding violence, intimidation, etc., and which do not in any way terminate appellants' employee status or their collective bargaining rights, even though in some later cases when the issue is properly presented to this court some other sections of the act, or parts thereof, may be found invalid.

Appellants' quotation from *Employers' Liability Cases*, 207 U. S. 463, 501, 28 S. Ct. 141, as follows, makes this clear.

> "Equally clear it is, generally speaking, that where a Statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal."

The Wisconsin Act contains a separability clause. (Section 111.18, Appendix in Appellants' Brief, p. 80).

(i) Appellants' entire brief is predicated upon a false premise.

That premise is that an order which forbids violence and intimidation on the part of strikers unlawfully interferes with self-organization and with collective bargaining. Counsel erroneously say that such an order destroys "the practices and procedures of collective bargaining in labor relations affecting interstate commerce protected by Federal law." (Appellants' Brief, p. 53)

CONCLUSION

Nothing in the subsections of the statutory provisions in issue or the Order made under them, in any way interferes with, conflicts, or affects the objects of the National Act which was passed to protect, namely, the rights of self-organization and the rights of collective bargaining.

In view of the foregoing the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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